

SUPER LAW GROUP, LLC

August 22, 2014

Submitted via FOIA online

Regional Freedom of Information Officer
U.S. Environmental Protection Agency
Region 2
290 Broadway, 26th Floor
New York, NY

Re: **FOIA Request Concerning New York State Office of Parks,
Recreation and Historic Preservation Identification of UIC Wells**

Dear Regional FOIA Officer

We are writing on behalf of Waterkeeper Alliance, Inc. (Waterkeeper) to request records in the possession of the U.S. Environmental Protection Agency (EPA) pursuant to the Freedom of Information Act (FOIA).

I.

RECORDS REQUESTED

This request pertains to a letter dated November 26, 2013 from Douglas McKenna, Chief of EPA Region 2's Water Compliance Branch, to Andy Beers, Executive Deputy Commissioner of the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"). *See* attached, Exhibit A (the "Letter"). In the Letter, EPA requested OPRHP to, within 60 days of receipt of the Letter, "[p]rovide EPA with a complete inventory of [Underground Injection Control] wells for each New York State Park[.]" and went on to provide detailed instruction on how OPRHP could adequately comply with the request. *See* Letter at 2.

We hereby request all records OPRHP has provided EPA responsive to its November 26, 2013 request, and any records concerning subsequent communications between EPA and OPRHP with respect to the Letter and/or the information requested in the Letter. For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of

data from which information can be obtained.¹

In addition, Waterkeeper Alliance requests all “Inventory or Injection Wells” and “Class V Well Pre-Closure Notification” forms (*see* examples attached hereto as Exhibit B), submitted by OPRHP to EPA after October 2013.

Waterkeeper Alliance requests electronic copies wherever possible. Please produce the records described above by emailing them to nick@superlawgroup.com or through FOIAonline, or by mailing them to the address listed on the first page of this letter.

Please produce the records on a rolling basis; at no point should EPA’s search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. In the event that EPA determines that some of the records requested above may already be publicly available, we will be happy to discuss whether the scope of this request can be narrowed accordingly.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request² and that such response must include a “determination” as to whether Waterkeeper Alliance will receive all the documents they request – that is, “[EPA] must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.”³ Further, “FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.”⁴

II.

FEE WAIVER

Waterkeeper requests that EPA waive all fees associated with responding to this request. FOIA dictates that requested records be provided without charge if “[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester.”⁵ As explained below, the requested disclosure would meet both of these requirements because Waterkeeper’s

¹ *See* 40 C.F.R. § 2.201(j).

² *See* 5 U.S.C. § 552(a)(6)(A)(i).

³ *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 186 (D.C. Cir. 2013).

⁴ *Id.* at 188 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i)).

⁵ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1).

request complies with each of the factors agencies and courts consider in making fee waiver determinations.⁶

A. Disclosure is in the Public Interest.

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.”⁷ Specifically, as we discuss immediately below in subsections II.A.1-4, the requested disclosure would satisfy the four elements identified in EPA’s FOIA Regulations⁸ and in the U.S. Department of Justice’s Fee Waiver Policy Guidance.

1. The request concerns the operations or activities of the government.

The requested records concern “the operations or activities of the government.”⁹ As the EPA’s November 26, 2013 letter explains,

inventory of UIC wells is requires pursuant [to] 40 Code of Federal Regulations (CFR) §§ 144.26, 144.27 and 144.83(a) and UIC wells must either be authorized by rule in accordance with 40 CFR § 144.24 and §144.84 or by permit in accordance with 40 CFR 144.3. Additionally, there are two well types that are banned and require closure, large capacity cesspools and motor vehicle waste disposal wells.

See Letter at 1. The records requested pertain to OPRHP’s operation of UIC wells, and OPRHP’s compliance with the aforementioned regulations, which have been promulgated by EPA under the Safe Drinking Water Act (SDWA). These regulations “are designed to assure that the operation of injection wells will not contaminate underground sources of drinking water or endanger human health.” *Id.* Waterkeeper is concerned with OPRHP activities in relation to that goal, and the information EPA has available to inform enforcement activities under the SDWA.

2. The disclosure is likely to contribute to an understanding of government operations and activities.

The information has high informative value and the disclosure is likely to contribute

⁶ The U.S. Department of Justice (DOJ) has identified six factors to assess whether the two requirements have been met, and the courts have applied these factors. *See, e.g.,* Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

⁸ *See* 40 C.F.R. § 2.107(l)(2).

⁹ 40 C.F.R. § 2.107(l)(2)(i).

meaningfully to an understanding of government operations,¹⁰ because much of the requested information is not currently in the public domain and would disclose information concerning whether OPRHP is in compliance with SDWA regulations at its state parks, and the extent to which EPA is enforcing violations of the Act.

3. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Disclosure will likely contribute to the understanding of a broad public audience interested in compliance with and enforcement of the SDWA. Waterkeeper Alliance has expertise in this subject area and the ability and intention to disseminate to the public any newsworthy information it finds in the requested records.

Waterkeeper Alliance has 178 local Waterkeeper Alliance member organizations throughout the United States, and six in New York alone. Communities in New York, and across the nation, look to Waterkeeper Alliances for critical information concerning, among other things, sources of water pollution. The information requested is vital to helping the public understand the quality and safety of their drinking water, and compliance with and enforcement of the SDWA.

Waterkeeper Alliance has a proven ability to disseminate information quickly and effectively through various communication channels including publications, public interest litigation, educational programs, media initiatives, and its website. Waterkeeper Alliance's website www.waterkeeper.org is updated regularly and draw thousands of visits per month. Waterkeeper Alliance also publishes WATERKEEPER, a magazine on water-related environmental and public health subjects of current interest, which has an annual circulation of 130,000. Currents is Waterkeeper Alliance's electronic newsletter on water-related issues that is distributed by email to approximately 24,000 subscribers monthly and made available to the general public online. Waterkeeper Alliance also issues press releases and participates in press conferences and interviews with reporters.

Waterkeeper Alliance routinely uses FOIA to obtain information from federal agencies. Waterkeeper Alliance has demonstrated its ability to analyze and distribute information to a broad audience of interested people.

4. The information will contribute "significantly" to public understanding of government operations or activities.

Disclosure of the requested documents is "likely to contribute significantly to public understanding,"¹¹ because Waterkeeper intends to disseminate any newsworthy

¹⁰ 40 C.F.R. § 2.107(l)(2)(ii).

¹¹ 5 U.S.C. § 552(a)(4)(iii); 40 C.F.R. § 2.107(l)(2)(iv).

information in the released records, and their analysis of such records, to their member bases and to the broader public, through one or more of the many communications channels referenced above. The manner in which OPRHP operates injection wells, whether any banned injection wells exist in state parks, and the extent to which OPRHP's operation of injection wells may contaminate underground sources of drinking water or endanger human health are all subjects that are presently unknown to the general public, but would be of interest to many members of the public concerned about environmental issues and stewardship by the government. Therefore, the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent.¹²

B. Waterkeeper has no commercial interest in this information.

Disclosure in this case would also satisfy the second prerequisite for a fee waiver because Waterkeeper does not have any commercial interest that would be furthered by the requested disclosure.¹³ Waterkeeper is a not-for-profit organization and, as such, has no commercial interest.¹⁴ "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"¹⁵ Waterkeeper's interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about OPRHP compliance with, and EPA enforcement of, the SDWA.

For all of the foregoing reasons, a fee waiver is warranted here.

C. Waterkeeper is a media requester.

Even if EPA were to deny a public interest waiver of all costs and fees, Waterkeeper is a representative of the news media entitled to a reduction of fees under FOIA and EPA's FOIA regulations.¹⁶ Under FOIA, a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."¹⁷

¹² 40 C.F.R. § 2.107(l)(2)(iv).

¹³ 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

¹⁴ 40 C.F.R. § 2.107(l)(3)(i).

¹⁵ *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

¹⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii), (l).

¹⁷ 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. United States Dep't of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

As described earlier in this request, Waterkeeper publishes WATERKEEPER magazine, which has an annual circulation of 130,000, and Currents an electronic newsletter that reaches 24,000 subscribers. These publications routinely include information about current events of interest to the readership and the public. Waterkeeper maintains a significant additional communications presence on the internet through articles routinely posted on its website. Thus, Waterkeeper is also a media requester.

IV.

WILLINGNESS TO PAY FEES UNDER PROTEST

Please provide the records above irrespective of the status and outcome of your evaluation of Waterkeeper's fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, Waterkeeper states that it will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations.¹⁸ Please consult with us, however, before undertaking any action that would cause the fee to exceed \$150. Such payment will not constitute any waiver of Waterkeeper's right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

Thank you for your attention to this matter. If there is anything we can do to facilitate this request or if you have any questions, please contact us.

Very truly yours,



Nicholas W. Tapert

Attachments

cc (via e-mail):
Doug McKenna, EPA

¹⁸ 40 C.F.R. § 2.107(c)(1)(iv), (c)(2), and (d).

Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

NOV 26 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Article Number: 7005 3110 0000 5940 0302

Andy Beers, Executive Deputy Commissioner
New York State Office of Parks, Recreation and Historic Preservation
625 Broadway, 2nd Floor
Albany, NY 12238

Re: Inventory of Injection Wells for Sunken Meadow State Park; Robert Moses State Park;
Wildwood State Park; Heckscher State Park and Belmont State Park
Suffolk County, NY, and
Request for Information: SDWA-UIC-IR-14-001

Dear Mr. Beers:

The US Environmental Protection Agency (EPA) Underground Injection Control (UIC) Program is in receipt of the October 11, 2013 submittal from Cashin Associates, P.C. on behalf of the New York State Office of Parks, Recreation and Historic Preservation (OPRHP). The submittal included the Inventory of Injection Wells, including large capacity cesspools, for five New York State Parks in the Long Island State Parks Region: Sunken Meadow State Park, Robert Moses State Park, Wildwood State Park, Heckscher State Park and Belmont Lake State Park, all in Suffolk County, NY. As you are aware, large capacity cesspools are banned and must be closed or upgraded.

EPA has reviewed the New York State Department of Environmental Conservation (NYSDEC) and OPRHP Order on Consent (Order) signed on October 11, 2013, and determined that OPRHP's compliance with the Order will address the existing UIC violation at the five parks referenced above. EPA will continue to monitor your progress with implementation of the ordered provisions and ultimate closure of the large capacity cesspools.

As you are aware, inventory of UIC wells is required pursuant 40 Code of Federal Regulations (CFR) §§144.26, 144.27 and 144.83(a) and UIC wells must either be authorized by rule in accordance with 40 CFR §144.24 and §144.84 or by permit in accordance with 40 CFR §144.31. Additionally, there are two well types that are banned and require closure, large capacity cesspools and motor vehicle waste disposal wells. Failure to operate an injection well under authorization by rule or permit constitutes noncompliance with UIC regulations. The UIC regulations are designed to assure that the operation of injection wells will not contaminate underground sources of drinking water or endanger human health.

EPA records indicate that the no other New York State Park has inventoried large capacity cesspools. The enclosed table is a list of New York State Parks for which EPA has records of UIC wells. Please provide EPA with a complete inventory of UIC wells for each New York State Park.

Submit the following information within 60 days of receipt of this letter:

- Identify the discharge point for each of the drains at your facility. Acceptable options include but are not limited to dye testing of drains and as built diagrams of facility showing piping.

As required by 40 CFR §144.26, §144.27 and §44.83(a), should any drains discharge to one or more injection wells, you must complete inventory forms for these injection wells. Enclosed is an inventory form (EPA Form 7520-16) and Region II Supplemental Instructions with additional information requirements that must be submitted if you possess a facility which uses an underground injection well. Also enclosed is a listing of Class V injection well types. Please use the enclosures when filling out the inventory form. These documents can also be found on the internet at:

<http://www.epa.gov/safewater/uic/pdfs/7520-16.pdf>

http://www.epa.gov/region02/water/compliance/supplemental_instructions_inventory.pdf

http://www.epa.gov/region02/water/compliance/wellclasstypetable_inventoryc_form

- For any injection well inventoried above, you must submit a detailed description of all types of fluids that are or may be discharged into the injection well.

Please submit all information to the following address:

Nicole Foley Kraft, Chief
Ground Water Compliance Section
United States Environmental Protection Agency
290 Broadway, 20th Floor
New York, NY 10007-1866

If you are certain that there are no discharges from a facility into a UIC Class V well, you must submit verification that all drains discharge to somewhere other than an injection well, such as the storm or sanitary sewer; surface water such as a stream, lake, etc.; or onto the ground surface. Examples of verification would be: 1) a letter from the superintendent of the Sewer Authority reporting that no drains at the facility discharge to an injection well and where they do discharge, or 2) results from a dye test performed by a licensed engineer or plumber proving the drain(s) discharge to somewhere other than an injection well or 3) an updated plumbing blueprint of the facility verifying where each drain discharges and that none discharge to an injection well.

Failure to respond to this letter truthfully and accurately within the time provided may subject you to sanctions authorized by federal law. Please also note that all information submitted by you may be used in an administrative, civil judicial, or criminal action. In addition, making a knowing submission of materially false information to the U.S. Government may be a criminal offense.

If you have any questions please contact Nicole Foley Kraft of my staff at (212) 637-3093 or by e-mail at kraft.nicole@epa.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas McKenna".

for Douglas McKenna, Chief
Water Compliance Branch

Enclosures

cc: Joe Dimura, NYSDEC (via email)
Scott Crisafulli, NYSDEC (via email)

Exhibit B

United States Environmental Protection Agency

UIC Federal Reporting System

Class V Well Pre-Closure Notification Form

1. Name of facility: Belmont Lake State ParkAddress of facility: 625 Belmont AvenueCity/Town: West Babylon State: New York Zip Code: 11704County: Suffolk Location: 40.735417 Lat./Long.: -73.3373472. Name of Owner/Operator: New York State Office of Parks, Recreation and Historic PreservationAddress of Owner/Operator: 625 Belmont AvenueCity/Town: West Babylon State: New York Zip Code: 11704Legal contact: Scott Fish Phone number: 631-321-35333. Type of well(s): 5W10 Number of well(s): 8

4. Well construction (check all that apply):

- ☐ Drywell
 ☐ Septic tank
 ☒ Cesspool
☐ Improved sinkhole
 ☐ Drainfield/leachfield
 ☒ Other (Leaching Pools)

5. Type of discharge: Sanitary Waste6. Average flow (gallons/day): 12,560 7. Year of well construction: 1935 and Later

8. Type of well closure (check all that apply):

- ☐ Sample fluids/sediments
 ☒ Clean out well
☐ Appropriate disposal of remaining fluids/sediments
 ☐ Install permanent plug
☒ Remove well & any contaminated soil
 ☒ Conversion to other well type
☒ Other (describe): Legally abandon wells, tie outfalls into sewer treatment plant, or install new septic system

9. Proposed date of well closure: On or before Oct. 10, 201610. Name of preparer: Scott Fish Date: 01.07.14

Certification

I certify under the penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. (Ref. 40 CFR 144.32).

Name and Official Title (Please type or print)

Signature

Date Signed

Scott Fish, Capital Facilities - Regional Manager II

1/7/14